IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY PETITION NO.552 OF 2007

In the matter of Section 433 & 434 of the Companies Act, 1956;

And

In the matter of winding up of New Chemi Industries Ltd., having its registered office at Chakravarti, Ashok Cross Road, Kandivali, Mumbai - 400 001.

Adhunik Transport Organisation Ltd. .. Petitioner.

Ms.Kalyani Parmar for petitioner.

Mr.Rafeeq Peermohideen i/b.Pimenta Mithi & Co. for respondent.

CORAM : A.M.KHANWILKAR, J.
DATE : 27th November, 2007.

P.C.:

1. Heard Counsel for parties. Perused the pleadings and documents on record.

2. The petitioner’s claim is founded on the transportation service charges, recoverable from the respondent in terms of the offer, recorded in letter dated 1st April, 2005. In the chart produced as Exhibit-"B", the petitioner has given details of the bills raised from time to time for the transportation service, rendered from 10th June, 2005 till 7th August, 2005 and the outstanding

amount against the respective bills, aggregating to Rs.9,86,062/-.

3. According to the petitioner, the respondent failed and neglected to pay the said outstanding amount for which, statutory Notice dated 21st November, 2006 was issued to the respondents, calling upon them to pay the outstanding amount forthwith, together with interest @ 24% per annum as agreed between the parties. In response to the statutory Notice, the respondents denied their liability to pay any amount and asserted that the petitioner was liable to make good the loss, suffered by the respondents on account of short supply of 61 cases (610 litres of Pesticides), valuing about Rs.8,21,172.30. As the respondent did not offer the amount, the petitioners have approached this Court by way of present petition.

4. The principal argument canvassed on behalf of the petitioner is that the respondent cannot offset the amount claimed by the petitioner towards loss of goods during transit and the liability of the respondent is crystalised to pay the amount as per the bills raised from time to time, aggregating to Rs.9,86,062/-.

5. Reliance is placed by the Counsel for the petitioner on the decision of the Apex Court in the case of **Union of India v/s. Raman Iron Foundry reported in 1974 S.C. 1265.** In paragraph 9 thereof, indeed, the Apex Court has observed that the claim for damages for breach of the Contract is not a claim for the sum presently due and payable and the party, who commits breach would be liable to pay the amount only after the liability is adjudicated by the Court of Competent jurisdiction.

6. This argument, however, clearly overlooks that the respondent has rightly pressed into service, the acknowledgement of the receipts of short supplies of 61 cases during the transport and delivery at Guntur. The short supply of 61 cases is acknowledged by the representative of the petitioner **Narayan** on 22nd September, 2005, which position is discerned from the document at Exhibit-"A". That is not disputed by the petitioner. The petitioner, however, submits that irrespective of that acknowledgement, the respondent would still remain liable to pay the entire amount in terms of the bills raised by the petitioner from time to time. In the present proceedings, it is not necessary to answer the issue as to whether the respondent company is or is not entitled to retain the amount towards short supply of

goods, as a result of which, the respondent suffered loss to the extent of over Rs.8.00 lacs. The core question is, whether the respondent has a plausible explanation to offer for not paying the outstanding amount to the petitioner.

7. In the present case, it is seen that the respondent has not only registered the complaint with the local police station on 28th September, 2005 itself, but has also filed suit for recovery of sum over Rs.8.00 lacs towards loss suffered by the respondent on account of deficit supply of 61 cases by the petitioner. The fact that such a police complaint has already been registered and the suit is also instituted against the petitioner, is not disclosed in the present petition, which has been filed subsequently on 28th June, 2007. The explanation offered by the petitioner is that the petitioner was not aware either of the pending criminal action or the suit instituted by the respondent. Even if that explanation is to be accepted, the fact remains that the respondent has a just cause to raise a dispute or refuse to make payment of the outstanding bills of the petitioner. The respondent has already resorted to legal remedy to espouse its claim against the petitioner. If the respondents were to succeed in the said claim, there is hardly any amount,

which will become payable to the petitioner. Taking overall view of the matter, it is not possible to countenance the stand of the petitioner that the respondent will not be in a position to pay such an amount. Even if the respondent is required to pay the entire amount, it will be only to the extent of over Rs.8.00 lacs alongwith the interest to be accrued thereon. There is nothing to suggest that the respondent company has no means to pay such amount.

8. In my opinion, the decision pressed into service on behalf of the petitioner is of no avail to the petitioner in the present petition.

9. In my opinion, this is not a fit case for admission of the Company Petition. The petitioner, if so advised, may take recourse to such remedy as is permissible in Law for recovery of the amount from the respondent.

10. Petition is dismissed.

(A.M.KHANWILKAR, J.)